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2 UNITED STATES DISTRICT COURT  
3 WESTERN DISTRICT OF WASHINGTON  
4 AT SEATTLE

5 TODD COLLINS, et al.,

6 Plaintiff(s),

7 v.

8 GEE WEST SEATTLE, LLC,

9 Defendant(s).

NO. C08-238MJP

ORDER ON CROSS-MOTIONS FOR  
PARTIAL SUMMARY JUDGMENT:  
VOLUNTARY DEPARTURE

10 The above-entitled Court, having received and reviewed

- 11 1. Plaintiffs' Motion for Partial Summary Judgment on Voluntary Departure (Dkt. No.  
12 26)
- 13 2. Defendant's Response on Cross Motions for Summary Judgment Regarding Voluntary  
14 Departure (Dkt. No. 29)
- 15 3. Defendant's Motion for Summary Judgment Regarding Voluntary Departure (Dkt. No.  
16 25)
- 17 4. Plaintiffs' Opposition to Defendant's Motion for Summary Judgment on Voluntary  
18 Departure (Dkt. No. 31)

19 and all attached declarations and exhibits, makes the following ruling:

20 IT IS ORDERED that Defendant's motion for partial summary judgment on the issue of  
21 "voluntary departure" is GRANTED; the Court finds as a matter of law that the employees of  
22 Defendant who left their employment between September 26 and October 5, 2007 "voluntarily  
23 departed" for purposes of the WARN Act.

24 IT IS FURTHER ORDERED that Plaintiffs' motion for partial summary judgment on the same  
25 issue is DENIED.

## 1    **Background**

2            Defendant operated three new car dealerships, as well as a used car facility, body shop and an  
3    auto loan department. On September 26, 2007, Defendant issued an advisory to its employees that it  
4    was actively seeking a buyer for the business and that, if no purchaser was found by October 7, 2007,  
5    business operations would cease. Gee Dep., Ex. 5.

6            Prior to the announcement, Defendant had approximately 150 employees. Following the  
7    announcement, employee defections began, continuing at such a rate that the General Manager was  
8    concerned about whether operations could continue. Gee Dep., 57:17-22, 58:13-17. By the morning  
9    of October 5, 2007, only about 30 employees remained throughout all the various facilities. Decl. of  
10   Brewer, ¶¶ 6-7. Defendant closed its doors on that day, reopening briefly the following day for  
11   inspection by a potential buyer, but then closing permanently thereafter. *Id.*, ¶¶ 8 and 10.

## 12    **Discussion**

### 13    The WARN Act

14            The Worker Adjustment and Retraining Notification (“WARN”) Act, 29 U.S.C. § 2101 et  
15    seq., requires that employers of more than 100 employees must provide 60 days’ notice in advance of  
16    the shutdown of a site,<sup>1</sup> where that shutdown results in an “employment loss” for 50 or more  
17    employees. 29 U.S.C. § 2101(a)(2).

18                            [T]he term “employment loss” means (A) an employment termination, *other than a*  
19                            *discharge for cause, voluntary departure, or retirement.* . .

20    29 U.S.C. § 2101(a)(6) (emphasis supplied). An employment action that results in the cessation of  
21    production or work is a “plant closure” even if a few employees remain afterwards. *See* 20 C.F.R. §  
22    639.3(b).

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25            <sup>1</sup> Defendant concedes, for purposes of these motions only, that all the operations comprised a single “site.”

1 The burden of proof rests with Plaintiffs to prove a prima facie case under the WARN Act.  
2 See Johnson v. Telespectrum Worldwide, Inc., 61 F.Supp.2d 116, 121 (D.Del. 1999). If an employer  
3 shuts down a plant in violation of the WARN Act, that employer “shall be liable to each aggrieved  
4 employee who suffers an employment loss as a result of such closing. . . back pay for each date of the  
5 violation. . .” and lost benefits. 29 U.S.C. § 2104(a)(1). An “aggrieved employee” is defined as “an  
6 employee who has worked for the employer ordering the plant closing. . . and who, as a result of the  
7 failure by the employer to comply with section 2102 of [the WARN Act], did not receive timely  
8 notice. . .” 29 U.S.C. § 2104(a)(7).

9  
10 “Voluntary departure”

11 At issue in this motion is whether the 120 employees who left their jobs between the  
12 announcement of September 26, 2007 and the final closure of the business’s doors on October 5,  
13 2007, suffered an “employment loss.” By the language of the WARN Act, if the abandonment of their  
14 jobs by those 120 employees was a “voluntary departure,” then Defendant’s actions do not constitute  
15 a violation of the statute because (on October 5, 2007, when the business actually ceased operations)  
16 fewer than 50 employees would have suffered an “employment loss.”

17 The statute provides no definition of “voluntary departure” and there appears to be little  
18 WARN Act case law on point. Plaintiffs argue that “where a company announces a plant closure on  
19 less than 60 days’ notice, employees who start seeking alternative employment prior to the closure  
20 date because their employer failed to comply with the WARN Act have not “voluntarily departed”  
21 within the meaning of that statute.” Pltfs. Mtn., p. 2.

22 This argument suffers from several flaws. The Court notes at the outset that the notice which  
23 was circulated to Defendant’s employees on September 26 was not a “notice of closure:” it was a  
24 “notice of possible sale.” Only if Defendant could not find a purchaser for the business was the

1 intention to cease operations. Neither party addresses the issue of whether this constitutes a “notice of  
2 closure” for WARN Act purposes. At the very least, it undercuts Plaintiffs’ implied argument that the  
3 120 employees who left between September 26 and October 5 were “forced” to leave by the certain  
4 knowledge that they would have no jobs after October 7. In any event, the facts are that operations  
5 did eventually cease and Defendant does not contest that it failed to give 60 days’ advance notice of  
6 that closure.

7 Plaintiffs concede that they have no case authority to support their position regarding whether  
8 the 120 employees voluntarily departed. Pltfs. Mtn., p. 14. They cite to a 1989 commentary by the  
9 Department of Labor (“DOL”) on the Act which states

10 DOL does not, however, agree that a worker who, after the announcement of a plant  
11 closing or mass-layoff, decides to leave early has necessarily been constructively  
discharged or quit involuntarily.

12 54 FR 16048. This language does not constitute an endorsement of Plaintiffs’ argument; it states, in  
13 effect, that it should not be assumed that an early departure following announcement of a closure is an  
14 involuntary departure, which is precisely what Plaintiffs are asking the Court to do.

15 The commentary defines “constructive discharge” as a situation where “the employer has  
16 created a hostile or intolerable work environment or has applied other forms of pressure or coercion  
17 which forced the employee to quit or resign.” (Id.) This definition does not comport with the facts of  
18 this case as they have been developed by the parties and, in fact, Plaintiffs do not argue that  
19 Defendant’s actions equated to an act of constructive discharge. Plaintiffs also quote a portion of the  
20 commentary (“In the situation posted, where the plant closing. . . has been announced. . . the worker  
21 has already received the notice that WARN requires and whether his later resignation or retirement is  
22 voluntary or not is no longer germane;” id.) which is not applicable to their facts or their argument.  
23 Ultimately, the Court finds that the DOL commentary does nothing to advance Plaintiffs’ position.

1 Plaintiffs want the Court to interpret the WARN Act to exclude from “voluntary departure”  
2 the situation where an employee, fearing unemployment following a future closure (and only a possible  
3 closure under the facts before the Court), leaves of his or her own free will (i.e., is not terminated by  
4 the employer or forced out by hostile or intolerable conditions) to seek employment elsewhere. But  
5 the Court remains cognizant that “[a] fundamental canon of statutory construction is that, unless  
6 otherwise defined, words will be interpreted as taking their ordinary, contemporary, common  
7 meaning.” Long v. Dunlop Sports Group Americas, Inc., 506 F.3d 299, 302 (4th Cir. 2007).

8 “Voluntary” is defined as “[d]one or undertaken of one’s own free will.” American Heritage  
9 Dictionary of the English Language (4th ed., 2009). The pre-closure departure of the 120 employees  
10 at issue here is not any less “voluntary” for having possibly<sup>2</sup> been motivated by the belief that they  
11 would be unemployed in the near future. The Court finds that an employee who leaves of their own  
12 free will prior to the closure of a business has (absent allegations of constructive discharge)  
13 “voluntarily departed” for purposes of the WARN Act and has not suffered an “employment loss” as  
14 defined by that statute.

15  
16 Equitable estoppel

17 Plaintiffs resort to an ancillary “equitable estoppel” argument which is equally unavailing.  
18 Their rationale that “a party should not be allowed to benefit from its own wrongdoing” (NLRB v.  
19 Advanced Stretchforming Int’l Inc., 233 F.3d 176, 1182 (9th Cir. 2000)) loses its force in the face of  
20 the Court’s finding that no wrongdoing occurred. Even were the Court willing to entertain the  
21 argument, however, it would fail from lack of proof of the primary element of the claim: that “Gee  
22 West knew that a business shutdown would occur within 60 days, but concealed that material fact  
23

24  
25 <sup>2</sup> The record is devoid of any declarations from employees concerning the motivation for their early departure.

1 from its employees.” Pltfs. Mtn., p. 12. Plaintiffs have presented no evidence that Defendant knew,  
2 60 days in advance of the closure of its business operations, that it would in fact be shutting down.<sup>3</sup>

3 There is evidence that Defendant intended its employees to rely on a belief that the business  
4 would not close (believing that a host of employee departures would have hampered attempts to find a  
5 buyer; Gee Dep., Ex. 5), but no evidence by way of declaration or deposition from the affected  
6 employees that they relied on this to their detriment – Plaintiffs merely make the unsupported assertion  
7 that “the employees did rely on the concealment by not searching for alternative employment before  
8 the announcement of the closure on September 26.” Pltfs. Mtn., p. 12.

9 Plaintiffs are not entitled to summary judgment on the basis of equitable estoppel.

#### 10 **Conclusion**

11 It is the finding of the Court that the employees of Defendant’s business who left their jobs  
12 between September 26, 2007 (the date of the “sell-or-close” announcement) and October 5, 2007  
13 “voluntarily departed” within the meaning of the WARN Act. On the basis of that ruling, the Court  
14 further finds that fewer than 50 employees suffered an “employment loss” from the closure of  
15 Defendant’s business, as defined by 29 U.S.C. § 2101(a)(6)(A). Defendant is not equitably estopped  
16 from making this argument, and partial summary judgment will be awarded to Gee West Seattle, LLC  
17 on the issue of “voluntary departure.”

18 The clerk is ordered to provide copies of this order to all counsel.

19 Dated: November \_10\_, 2009

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22 Marsha J. Pechman  
23 U.S. District Judge

24 <sup>3</sup> The September 26th letter to Defendant’s employees does indicate that the employees were not told of the  
25 potential closure prior to that date because it would have impacted attempts to sell the business had mass defections  
occurred, but the document says nothing about when Defendant arrived at the sell-or-close decision. Gee Dep., Ex. 5.